MIKAIL TAN ABDULLAH v. PP

HIGH COURT, SABAH & SARAWAK, KUCHING
YEW JEN KIE J
[CRIMINAL REVISION NO: KCH-43-3-4-2017]
29 JUNE 2017

CRIMINAL PROCEDURE: *Revision – Application for – Magistrate ordered applicant to be detained at hospital for one month for psychiatric observation – Remand at hospital extended by Sessions Court upon two applications by hospital – Whether third month extension valid, lawful and legal – Whether Sessions Court seized with jurisdiction and power to detain applicant for third time – Criminal Procedure Code, s. 342(3), (4)*

The applicant was charged with eight charges at the Magistrate's Court and two charges at the Sessions Court. On 16 February 2017, the Magistrate granted an order under s. 342 of the Criminal Procedure Code ('the CPC') for the applicant to be detained at the hospital for a month for observation ('the initial one month remand'). On 10 March 2017, upon application by the hospital ('the second application'), the Sessions Court Judge ('the SCJ') allowed the second application by extending the remand of the applicant at the hospital for another month ('the second month extension'). On 13 April 2017, the Medical Director of the hospital wrote to the SCJ, seeking further extension of the applicant's remand for another month ('the third application') and the third application was allowed ('the third month extension'). Hence, the present application for revision pursuant to s. 323 of the CPC read with ss. 31 and 35 of the Courts of Judicature Act 1964. In support of his application, the applicant argued that the third month extension was erroneous, unlawful and/or illegal on the grounds that (i) the court had no jurisdiction nor power to detain the applicant for the third time under s. 342(3) and (4) of the CPC; (ii) the pre-conditions of s. 342(3) and (4) were not met; and (iii) interpretation of sub-ss. (3) and (4) show two reasonable constructions, one of which is that the court could detain a subject for a period of two months only and not for a further third month.

Held (allowing revision; setting aside third month extension):

(1) Upon perusal of s. 342(3) and (4) of the CPC, there was no ambiguity. The maximum period of remand allowed under s. 342(3) and (4) is three months. The first month remand is provided for under sub-s. (3) and by virtue of sub-s. (4), if the first month remand is sufficient to arrive at a definite conclusion as to the state of the mind of the accused person, upon certification by the Medical Director of the psychiatric hospital, the court could extend the remand which may extend to two months. The two months' extension in sub-s. (4) excluded the initial one-month remand. (para 25)

(2) On 16 March 2017, the SCJ granted the second month extension, which was one month, instead of two months allowed under sub-s. (4), upon application by the Medical Director of the hospital. The SCJ had no jurisdiction to allow the third application and had misdirected himself in granting a third month extension. Furthermore, the prosecution and the applicant did not receive the certificate signed by the Medical Director of the hospital stating the basis for the third application. Consequently, they were deprived of knowing the grounds for the third application and the opportunity of submitting on the third application. This was a clear procedural error or irregularity. (paras 26, 27 & 29)

Case(s) referred to:
Liew Sai Wah v. PP [1968] 1 LNS 180 PC ***(refd)***
PP v. Chua Chor Kian [1997] 1 LNS 447 HC ***(refd)***
Tenaga Pharmed Sdn Bhd v. PP And Other Applications [1994] 2 CLJ 858 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35
Criminal Procedure Code, ss. 323, 342(1), (2), (3), (4)

For the applicant - Shankar Ram Pohumall, Asnani & Daniel Ling Chok Luk; M/s Thomas, Shankar Ram & Co
For the respondent - Musli Ab Hamid & Haresh Prakash Somiah; DPPs

Reported by Najib Tamby

JUDGMENT

Yew Jen Kie J:

[1] The applicant, Mikail Tan Abdullah, is arraigned as follows in the Magistrate's Court:

(a) three charges under No. KCH-83-528-8-2016;

(b) three charges under No. KCH-83-529-8-2016; and

(c) two charges under No. KCH-83-530-8-2016.

All the above cases had been ordered to be jointly tried.

[2] The applicant is also arraigned on two charges under No. KCH-62-23-8-2016 in the Sessions Court.

[3] On 16 February 2017, the Magistrate granted an order under s. 342 Criminal Procedure Code (CPC) for the applicant to be detained at Hospital Sentosa Kuching for a period of one month for observation (initial one month remand).

[4] On 10 March 2017, upon application by Hospital Sentosa (the second application) and without requesting for submissions from counsel, the Sessions Court allowed the second application by extending the remand of the applicant at Kota Sentosa Hospital for another one month (the second month extension).

[5] On 16 March 2017, learned counsel for the applicant appeared before the Sessions Court Judge and raised their objections to the second month extension on the ground that the respondent's counsel has not been informed about the application for such extension. (See NOP dated 16 March 2017). The court fixed the case for further mention on 19 April 2017, which was brought forward to 13 April 2017.

[6] On 13 April 2017, pursuant to a written application made by the Medical Director of Hospital Sentosa directly to the Sessions Court Judge (the third application), to further extend the remand of the applicant for another month, all parties appeared before the learned Sessions Court Judge. Learned counsel for the respondent claimed that the third application had not been extended to him. The third application had also not been extended to the learned Deputy Public Prosecutor. Notwithstanding that application had also not been extended to the learned Deputy Public Prosecutor and the respondent, the learned Sessions Court Judge allowed the third application extending the remand for another month (the third month extension).

[7] It is the contention of the applicant that the third month extension is erroneous, unlawful and/or illegal on the following grounds:

(a) The court has no jurisdiction nor power to detain the applicant for the third time and for the third month under s. 342(3) and (4) of the CPC.

(b) The preconditions of s. 342(3) and (4) are not met.

(c) Interpretation of sub-s. (3) and (4) show two reasonable constructions, one of which is that the court can detain a subject for a period of two months only and not for a further third month.

[8] Hence, the present application for revision pursuant to s. 323 of CPC read with ss. 31 and 35 of the Courts of Judicature Act 1964.

The Law

[9] The provisions which governs a person of unsound mind is found in s. 342 of the Criminal Procedure Code, which states:

> (1) When a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness.
>
> (2) At the investigation it shall not be necessary for the accused person to be present and the Judge or Magistrate may receive as evidence a certificate in writing signed by a Medical Officer to the effect that

A the accused person is in his opinion of unsound mind or is a proper person to be detained for observation in a psychiatric hospital, or the Judge or Magistrate may, if he sees fit, take oral evidence from a Medical Officer on the state of mind of the accused person.

(3) If not satisfied that the person is capable of making his defence, the B Judge or Magistrate shall postpone the trial and shall remand that person for a period not exceeding one month to be detained for observation in any psychiatric hospital in Malaysia.

(4) The Medical Director of the said psychiatric hospital shall keep that person under observation during the period of his remand and before the expiry of that period shall certify under his hand to the C Court his opinion as to the state of mind of that person, and if he is unable within the period to form any definite conclusion, shall so certify to the Court and shall ask for a further remand. Such further remand may extend to a period of two months.

(5) The Public Prosecutor may at any stage of any proceedings prior to D the trial order that any accused person whom he suspects to be of unsound mind be sent to a psychiatric hospital for observation for a period not exceeding one month. The Medical Director of that psychiatric hospital shall keep that person under observation during the said period and before the expiry of the said period shall certify under his hand to the Public Prosecutor his opinion as to the state E of mind of that person. If the said Medical Director is unable within the said period to form any definite conclusion he shall so certify to the Public Prosecutor, and the Public Prosecutor may order that person to be detained in that psychiatric hospital for a further period not exceeding two months. The Medical Director of a psychiatric hospital may, notwithstanding anything in the Mental Health Act F 2001 [Act 615], contained, detain any accused person in respect of whom an order has been made under this subsection for a period not exceeding the period specified in the order.

[10] The notes of proceedings dated 13 April 2017 revealed that the learned G Sessions Court Judge, in granting the third month extension upon application by the Medical Director of Hospital Sentosa, uttered that the applicant might rely on the defence of unsound mind and if the court did not further extend the remand and released the applicant instead, there would be "no medical report on the status of the unsoundness of mind by medical officer under the CPC as opposed to the one from private clinic or hospital." To avoid such H a situation, the learned Sessions Court Judge adopted a purposive interpretation of s. 342(4) of the CPC and accordingly granted the third month extension.

[11] Learned counsel for the applicant submitted that the interpretation of penal statutes must be construed strictly and words must not be read into it. I If the provision is capable of two different constructions, then the more lenient one must be adopted, citing *Liew Sai Wah v. PP* [1968] 1 LNS 180; [1968] 2 MLJ 1 which held:

The Internal Security Act is a penal Act and must be construed strictly. In *Halsbury's Laws of English* vol. 36 p. 415 para. 631 the following appears:

> It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt

As Lord Simonds said in *LNE Ry. Co. v Berriman* [1946] AC 278 at page 313:

> A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the Court.

See also *PP v. Chua Chor Kian* [1997] 1 LNS 447; [1998] 1 MLJ 167.

[12] Learned counsel for the applicant submitted that the learned Sessions Court Judge has no jurisdiction to grant the third month extension. It was submitted that when sub-ss. (3) and (4) of s. 342 CPC are read as a whole, the words "two months" in ".... such further remand may extend to a period of two months" in sub-s. (4) included "the initial first month detention" and that the maximum period of remand is two months. It was submitted that the words ".... such further remand may extend to a period of two months" in s. 342(4) CPC does not state that "such further remand may extend to a further period for two months above the initial one month". It was submitted that in granting the third month extension, the learned Sessions Court Judge had read words "further", "for" and "above the initial one month" underlined above into sub-ss. (3) and (4) of s. 342 of CPC, which is a wrong thing to do, citing *Tenaga Pharmed Sdn Bhd v. PP And Other Applications* [1994] 2 CLJ 858, at 862 which held:

> In this regard, I also wish to advert to the Judgment of the House of Lords in *Thompson v. Goold & Co* [1910] AC 49, 420 where Lord Mersey said (at p. 420):
>
> > It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of a clear necessity it is a wrong thing to do.

[13] Learned counsel for the applicant submitted that as it is wrong to read words into sub-s. (4) of s. 342 CPC, which are clearly not contained therein, the learned Sessions Court Judge therefore has no power to grant the third month extension as it is not provided for in s. 342 (4) of the CPC.

[14] My understanding of the contention of learned counsel for the applicant is that pursuant to s. 342(4), the maximum period of remand for observation is only two months which comprised of the first one month

A remand and the second month extension. In other words, the "two months" as appeared in ".... such further remand may extend to a period of two months" in s. 342(4), includes the first one month remand.

[15] Learned Deputy Public Prosecutor (DPP) submitted that s. 342(3) empowers the presiding judge or Magistrate to remand an accused person for
B one month observation whereas s. 342(4) allows for a further extension of remand which may extend to two months and this excludes the first month remand. In total, an accused person may be remanded up to three months.

[16] In the premise, submitted learned DPP, the learned Magistrate is
C entitled to grant the first one month remand under s. 342 (3) and subsequently for the learned Sessions Court Judge to extend the remand period by granting the second month extension.

[17] The learned DPP conceded that s. 342 CPC does not provide for third application.

D **[18]** Upon close perusal of s. 342 of the CPC, my understanding is that pursuant to s. 342(1) of the CPC, a trial judge or trial Magistrate who has reasons to suspect that an accused person is of unsound mind and consequently incapable of making his defence, shall at first instance order for an investigation of such unsoundness.

E **[19]** Subsection (2) of s. 342 of the CPC stipulates that at the first instance investigation, which does not require the presence of the accused person, evidence may be received *via* a certificate signed by a medical officer stating that the accused person is, in his opinion, of unsound mind or is a proper person to be detained for observation in a psychiatric hospital or *via* oral
F evidence from a medical officer on the state of mind of the accused person.

[20] I believe that the initial one month remand made by the learned Magistrate on 16 February 2017 was the first instance investigation.

[21] Subsection (3) of s. 342 of the CPC provides that in the event the judge
G or Magistrate is not satisfied that the accused person is capable of making his defence, he shall remand the accused person for a period not exceeding one month for observation in any psychiatric hospital in Malaysia.

[22] I believe the second application was made under sub-s. (3) of s. 342 of the CPC and the second month extension was duly granted.

H **[23]** Pursuant to sub-s. (4) of s. 342 of the CPC, the medical director of the said psychiatric hospital shall keep the accused person under observation during that one month and before the expiry of that one month, he shall issue a certificate to the court stating his opinion as to the state of mind of the accused person. If, however, he is unable within the said one month period
I to form any definite conclusion, he shall inform the court and shall ask for a further remand. Such further remand may extend to a period of two months.

[24] I believe the third application was made under the provision of sub-s. (4) of s. 342 of the CPC and a third month extension was granted.

[25] Upon close perusal of sub-ss. (3) and (4) of s. 342 of the CPC, I do not find any ambiguity as contended by the applicant. I agree with learned DPP that the maximum period of remand allowed under s. 342(3) and (4) is three months. The first month remand is provided for under sub-s. (3) and by virtue of sub-s. (4), if the first month remand is insufficient to arrive at a definite conclusion as to the state of the mind of the accused person, upon certification by the medical which may extend to two months. In my view, the two months' extension in sub-s. (4) excludes the initial one month remand.

[26] The notes of proceedings dated 16 March 2017 showed that the learned Sessions Court Judge had on the *idem* date granted the second month extension (one month instead of two months allowed under sub-s. (4)) upon application by the Medical Director of Sentosa Hospital.

[27] *Liew Sai Wah* case, *supra*, showed that it is the general principle that penal enactment must be constructed strictly and not to be extended beyond their clear meaning. Upon strict construction of sub-ss. (3) and (4) of s. 342 CPC, it is plain that the said provision does not provide for a third application for extension of remand. Accordingly, I agree with the learned counsel for the applicant that the learned Sessions Court Judge has no jurisdiction to allow the third application and has misdirected himself in granting a third month extension.

[28] For the sake of argument, even if the Medical Director of Sentosa Hospital is permitted to make the third application to further extend the remand in view that there is still a balance of one month and that the learned Sessions Court Judge is correct in adopting a purposive construction of s. 342(4) of the Criminal Procedure Code, there is an obvious procedural error or irregularity which both learned counsel for the applicant and learned DPP had pointed out.

[29] A close perusal of the notes of proceeding dated 13 April 2017 and based on the submission of learned DPP and learned counsel for the applicant, neither party has received the certificate signed by the Medical Director of Sentosa Hospital stating the basis for the third application. The said certificate, if it exists, has never been produced nor shown to the DPP and counsel for the applicant. As a result, they are deprived of knowing the grounds for the third application and the opportunity of submitting on the third application. This is a clear procedural error or irregularity.

A

Conclusion

[30] For all the above reasons, I allow the revision on the following two grounds:

(a) Procedural error; and

B

(b) Erroneous interpretation of s. 342 of the Criminal Procedure Code.

[31] As such, the third month extension is set aside.

C

D

E

F

G

H

I